Nos. 90-802, 90-807, and 90-1094

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

In re WILLIAM M. KUNSTLER,
Petitioner,
In re LEWIS PITTS,
Petitioner,
In re BARRY NAKELL,
Petitioner,

ROBESON DEFENSE COMMITTEE, *et al.*,
Plaintiffs,
v.
JOE FREEMAN BRITT, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION, U.S. SENATOR JESSE HELMS, U.S. REPRESENTATIVES HOWARD COBLE AND J. ALEX McMILLAN, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONS

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February 21, 1991

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Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief as *amici curiae* in support of Respondents' opposition to the petitions for certiorari filed in these three cases, Nos. 90-802, 90-807, and 90-1094. Counsel for Respondents have consented to the filing of this brief, as has Petitioner Barry Nakell. Petitioner Lewis Pitts and counsel for Petitioner William Kunstler have not consented to the filing and have reserved their rights to oppose the filing at a later time. Accordingly, this motion is necessary.

The Washington Legal Foundaton is a national public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court and other state and federal courts on numerous occasions in cases affecting business.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both state and federal courts. WLF believes that amended Rule 11, Fed. R. Civ. P., can be an effective tool in combatting the ill effects of the litigation explosion; accordingly, WLF has consistently advocated for an expansive reading of Rule 11. For example, WLF appeared before this Court in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990), in support of Respondents.

Jesse Helms is a United States Senator from North Carolina. Howard Coble and J. Alex McMillan are U.S. Representatives from North Carolina. All three are concerned with the efficient operation of the court system in North Carolina and believe that it is important that

those who abuse the legal system ought to be sanctioned for their conduct.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* in this Court on a number of occasions. AEF believes that the public interest is best served by a legal system that deters abusive litigation practices by sanctioning those found to be engaging in such conduct.

Amici previously submitted an *amicus curiae* brief in this case when it was before the United States Court of Appeals for the Fourth Circuit. *Amici* believe that their experience in litigating Rule 11 matter may prove of assistance to the Court in its consideration of this Petition. *Amici* also believe that their brief provides a perspective that differs from the perspective provided by any of the parties, because *amici*'s brief is based less on the particular facts of this case and more on the broader policy considerations underlying Rule 11. *Amici* note that three groups are seeking leave to file *amicus* briefs in support of the Petitions.

For all the foregoing reasons, *amici* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Is a defendant prohibited from filing a motion for sanctions under Rule 11 of the Federal Rule of Civil Procedure following a Rule 41(a)(2) dismissal where the defendant -- prior to dismissal -- has not expressly reserved the right to seek sanctions?

2. Does the Fifth Amendment's Due Process Clause require a district court to conduct an evidentiary hearing whenever disputed factual issues arise in a Rule 11 proceeding?

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INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to file accompanying this brief.

STATEMENT OF THE CASE

Petitioners are three attorneys seeking review of a decision of the United States Court of Appeals for the Fourth Circuit, which upheld a district court decision that Petitioners had violated Rule 11 of the Federal Rules of Civil Procedure by filing a complaint "for an improper purpose" and without first making "a reasonable inquiry to determine if the complaint was well grounded in fact and warranted by existing law."[1] In the interests of judicial economy, *amici* adopt by reference the statement of the case set forth by Respondents.

Amici's principal reason for submitting this brief is not to support a particular version of the facts of this case but to urge the Court not to consider giving Rule 11 the unnecessarily narrow reading pressed by Petitioners. Rule 11 is a valuable tool in the effort to curb abusive litigation; its use ought to be encouraged to the maximum extent possible, consistent with its language and intent. Petitioners are asking the Court to place procedural straight-jackets on Rule 11 such that few aggrieved parties would have either the time or the resources necessary to pursue a Rule 11 claim. *Amici* respectfully suggest that whatever benefits that might be derived from implementing Petitioners' proposed procedures are far

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[1] The Court of Appeals also vacated the $122,000 sanction imposed by the District Court and remanded the case for a redetermination of the amount of the sanction. Neither side is seeking review of the Court of Appeals's decision to vacate the Rule 11 sanction.

outweighed by the costs that society would incur in the wake of the increased litigation that would result from a weakening of Rule 11.

The procedural posture of this case is straightforward and not in dispute. Respondents filed their motion for Rule 11 sanctions six weeks after the District Court had granted Petitioners' unopposed Rule 41(a)(2) motion to dismiss the case with prejudice. The District Court permitted Petitioners to file two written briefs in opposition to the Rule 11 motion, to submit evidence in the form of affidavits, and to argue orally against the motion. However, the District Court did not conduct evidentiary hearings on disputed factual issues. Petitioners contend that the Federal Rules prohibit a defendant from filing a motion for Rule 11 sanctions following a Rule 41(a)(2) dismissal unless the defendant -- prior to dismissal -- expressly reserves the right to seek sanctions. Petitioners further contend that the imposition of sanctions in the absence of an evidentiary hearing violated their due process rights.

SUMMARY OF ARGUMENT

Contrary to Petitioners' assertions, the Fourth Circuit's holdings in this case are not in conflict with the holdings from any other court of appeals. Indeed, the Fourth Circuit's holding that a Rule 41(a)(2) dismissal does not preclude a subsequent Rule 11 application for sanctions was virtually dictated by this Court's decision last year in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990). The Fourth Circuit's guidelines regarding when a district should conduct an evidentiary hearing in a Rule 11 proceeding, and its holding that the district courts are in the best position to determine whether an evidentiary hearing is required in any given case, are fully consistent with decisions from the other courts of

appeals. In the absence of a conflict between the decision below and other appellate decisions, review of the decision below by this Court is unwarranted.

Furthermore, the Fourth Circuit's holding was plainly correct. Nothing in the language of Rule 41(a)(2) suggests that a dismissal pursuant to that rule precludes a subsequent Rule 11 motion. The purposes of Rule 11 -- sanctioning litigants who needlessly burden the judicial system and deterring future misconduct -- are served by permitting Rule 11 sanctions to be sought both before and after a dismissal.

Requiring an evidentiary hearing every time a Rule 11 motion raises disputed factual issues would emasculate Rule 11 by substantially increasing the costs of seeking sanctions. An evidentiary hearing requirement would result in expensive satellite litigation over sanctions, since virtually every Rule 11 proceeding involves some factual dispute. When it drafted revised Rule 11 in 1983, the Advisory Committee stated that Rule 11 could not achieve its stated goals unless sanction proceedings were kept to a minimum. The Fourth Circuit correctly recognized that while evidentiary hearings may be mandated on occasion, the decision regarding whether to conduct such a hearing in a given Rule 11 proceeding is best left to the sound discretion of the district courts. The Fourth Circuit's decision that the district court did not abuse its discretion in declining to conduct an evidentiary hearing in this case was correct; moreover, that decision is not of sufficient importance to warrant review by this Court.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM ANY OTHER FEDERAL COURT

Petitioners take issue with two holdings of the Fourth Circuit in this case: (1) that Respondents' Rule 11 motion was timely even though it was filed after Petitioners' uncontested Rule 41(a)(2) dismissal motion was granted; and (2) that the District Court did not abuse its discretion in declining to conduct an evidentiary into disputed factual issues raised by the Rule 11 motion. As neither of those holdings conflicts with holdings from any other federal court, review of those holdings by this Court is unwarranted.

A. Rule 41(a)(2)

The Fourth Circuit held in this case that the timeliness of a motion for Rule 11 sanctions filed after a Rule 41(a)(2) dismissal "must be resolved on a case by case analysis," based on "equitable" considerations.[2] *In re Kunstler*, 914 F.2d 505, 513 (4th Cir. 1990). The court stated that a Rule 11 sanctions motion should not be

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[2] Rule 41(a)(2) provides in pertinent part:

> Except as provided in [Rule 41(a)(1)], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Rule 41(a)(1) provides for dismissal at the plaintiff's instance: (i) at any time prior to the filing of an answer or summary judgment motion by the defendant; or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Rule 41(a)(1) was unavailable to Petitioners in this case, because Respondents filed an answer and thereafter declined to sign a stipulation of dismissal.

granted under such circumstances if "a defendant has indicated an intent not to pursue sanctions, or the motion is filed an inordinately long time after dismissal." *Id.* However, the court rejected Petitioners' contention that a Rule 11 motion for sanctions should *never* be granted following a Rule 41(a)(2) dismissal. The court held that, in the absence of any evidence that Petitioners had been prejudiced by the six-week delay between the Rule 41(a)(2) dismissal and the filing of Respondents' Rule 11 motion, the District Court's consideration of the motion was proper. *Id.*

No other court of appeals has addressed the precise issue decided by the Fourth Circuit in this case: whether a Rule 41(a)(2) dismissal precludes consideration of a subsequently filed motion for Rule 11 sanctions. Accordingly, the Fourth Circuit's case-by-case approach to that issue cannot be said to conflict with any other court of appeals decision. In the absence of a conflict among the courts of appeals, review of the issue by this Court is unwarranted.

Petitioner Nakell cites five court of appeals decisions that he contends conflict with the Fourth Circuit's Rule 41(a)(2) holding. One of those decisions is in full accord with the Fourth Cicuit's holding and the other four simply are not on point. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988)(*en banc*), one of the cases cited by Petitioner Nakell, echoes the Fourth Circuit's case-to-case approach in considering the timeliness of Rule 11 motions. *Thomas* involved a Rule 11 motion filed after a case had been decided on the merits. Although encouraging courts and litigators "to provide prompt notice of an alleged Rule 11 violation," the Fifth Circuit in *Thomas* -- like the Fourth Circuit in *Kunstler* -- declined to establish a fixed deadline by which Rule 11 motions must be filed. *Id.* at 879, 881.

The other four cases cited by Petitioner Nakell simply are not on point. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988), did not turn on the court's interpretation of Rule 41(a); rather, the Third Circuit in that case established a "supervisory rule" -- binding within that ciruit only -- regarding the timing of Rule 11 sanction motions. The two cited Ninth Circuit decisions, *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 554-55 (9th Cir. 1986), *cert. denied*, 484 U.S. 823 (1987); *Lau v. Glendora Unified School District*, 792 F.2d 929 (9th Cir. 1986), stand for the proposition that when a district court enters a Rule 41(a)(2) dismissal that includes any terms or conditions, the plaintiff has "a reasonable period of time within which [either] to refuse the conditional voluntary dismissal by withdrawing [the] motion for dismissal or to accept the dismissal despite the imposition of conditions." *Id.* at 931. These two cases have nothing to do with Rule 11 and are of no relevance here. Even assuming that Rule 11 sanctions are "terms and conditions" of dismissal (a highly doubtful assumption, as discussed more fully below), Petitioners never asked the courts below to permit them to withdraw their dismissal motion, nor have they requested that this Court permit them to do so. The fifth case cited, *Barr Laboratories, Inc. v. Abbott Laboratories*, 867 F.2d 743 (2d Cir. 1989), dealt with a stipulated dismissal under Rule 41(a)(1)(ii), not (as here) a Rule 41(a)(2) dismissal. As the Fourth Circuit noted in distinguishing *Barr Laboratories*, Respondents (unlike the defendants in *Barr Laboratories*) never signed a stipulation of dismissal and never indicated to Petitioners that they would not be seeking Rule 11 sanctions. *Kunstler*, 914 F.2d at 512.

Petitioner Kunstler cites two district court decisions that allegedly conflict with the Fourth Circuit's decision. Neither case is on point. *Roe v. Operation Rescue*, No.

88-5157, 1989 WL 66452 (E.D. Pa., June 19, 1989), did not turn on Rule 41(a)(2). Rather, the district court in that case denied the Rule 11 motion in accordance with the Third Circuit's "supervisory rule" established in *Mary Ann Pensiero*. *Feldman v. Village of Lombard*, No. 86 C 3295, 1987 WL 9000 (N.D. Ill. 1987), held that the defendants had waived their rights to seek Rule 11 sanctions against the plaintiff by stating at a hearing on the plaintiff's Rule 41(a)(2) dismissal motion that they would not be seeking such sanctions; the district court never indicated that silence in the face of a Rule 41(a)(2) dismissal motion could result in waiver of one's right to seek Rule 11 sanctions. Other district court decisions are fully in accord with the Fourth Circuit's interpretation of Rule 41(a)(2). *See Cambridge Products, Ltd v. Penn Nutrients, Inc.*, 131 F.R.D. 464, 466 (E.D. Pa. 1990)(citing *Cooter & Gell*, 110 S.Ct. at 2457-58); *Sauls v. Penn Virginia Resources Corp.*, 121 F.R.D. 657, 679 (W.D. Va. 1988).

Moreover, all of the decisions that Petitioners contend are in conflict with the Fourth Circuit's decision were decided prior to this Court's 1990 decision in *Cooter & Gell*. While *Cooter & Gell* dealt with the interaction between Rule 11 and Rule 41(a)(1)(i) (and not, as here, with Rule 41(a)(2)), several of *Cooter & Gell*'s pronouncements are directly relevant to the issue raised by Petitioners. Were the courts cited by Petitioners given the opportunity to reconsider their decisions in light of *Cooter & Gell*, it is highly likely that any conflict between those decisions and the Fourth Circuit's *Kunstler* decision would disappear entirely. Accordingly, further review of the Fourth Circuit's decision is unwarranted.

Furthermore, *Cooter & Gell* can be read as disapproving the Second Circuit's *Barr Laboratories* decision, upon which Petitioners so strongly rely. *Barr Laboratories*

relies heavily on an earlier Second Circuit decision, *Johnson Chemical Co. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987), which held that a Rule 41(a)(1)(i) dismissal-as-of-right precludes subsequent consideration of a Rule 11 sanctions motion. *Johnson Chemical* was explicitly disapproved in *Cooter & Gell*. In addition, *Cooter & Gell* cites approvingly a case in direct conflict with *Barr Laboratories -- Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988) -- for the proposition that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under either Rule 41(a)(1)(i) or Rule 41(a)(1)(ii). *Cooter & Gell*, 110 S.Ct. at 2455. In sum, in light of this Court's *Cooter & Gell* decision, there simply is no current conflict among the lower federal courts regarding Rule 41(a)(2) warranting review by the Court.

B. Evidentiary Hearings

The Fourth Circuit held in this case that an evidentiary hearing is not absolutely required whenever a Rule 11 motion raises disputed factual issues, even if a violation of Rule 11's "improper purpose" prong is alleged. *Kunstler*, 914 F.2d at 521. Rather, the Fourth Circuit enumerated several factors that district courts should consider in determining whether the existence of disputed factual issues requires an evidentiary hearing to be conducted. *Id.* at 519-20.

The Fourth Circuit's position on evidentiary hearings does not place it in conflict with the holdings of any other court of appeals, Petitioners' claims to the contrary notwithstanding. The holdings in none of the five court of appeals cases cited by Petitioner Kunstler are in conflict with the Fourth Circuit.

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987), not only is not in conflict with the Fourth Circuit but actually is relied on by the Fourth Circuit in *Kunstler* as the basis for its guidelines for determining when an evidentiary hearing is needed. Similarly, there is no conflict between *Kunstler* and the Third Circuit's decision in *Jones v. Pittsburgh National Corp.*, 899 F.2d 1350 (3rd Cir. 1990). Far from laying down a mandatory requirement for evidentiary hearings whenever Rule 11 motions raise disputed factual issues, *Jones* held:

> Given the permutations inherent in fee applications and response thereto, any rigid rule [regarding the procedural rights that a court must afford to the target of a fee request] would, to say the least, be undesirable. The circumstances must dictate what is required. . . . [¶] [W]e think a district court *in the exercise of its sound discretion* must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution requires further proceedings, including the need for an evidentiary hearing.

Id. at 1358, 1359 (emphasis added).

Each of the other three cases cited by Petitioner Kunstler was discussed by the Fourth Circuit in its decision below and is not in conflict with that decision. The Sixth Circuit stated in passing in *Invst Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 405 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987), that the target of a Rule 11 motion had no cause for complaint because he "was afforded notice and opportunity for hearing, as required by due process," but the decision

makes clear that the required "hearing" need not necessarily be an evidentiary hearing. Indeed, even though the attorney was charged with violating the "improper purpose" prong of Rule 11, he was afforded no evidentiary hearing until after he had already been found to be in violation of Rule 11 and the only remaining issue was the amount of the sanction to be imposed. *Id.* at 400-01

Two Seventh Circuit decisions, *Brown v. National Board of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986), and *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 206 (7th Cir. 1985), stated in passing that an evidentiary hearing is required when a motion for sanctions alleges a violation of the "improper purpose" prong of Rule 11. However, the statements are *dicta*, since neither case involved an "improper purpose" allegation, and both cases upheld district court decisions to award Rule 11 sanctions without first holding evidentiary hearings. Certainly, neither decision supports Petitioners' broad claim that an evidentiary hearing is required whenever a disputed factual issue arises in a Rule 11 proceeding, since the Seventh Circuit *dicta* cited by Petitioners is explicitly limited to only one of the three types of possible Rule 11 violations.[3]

In the absence of any conflict between the Fourth Circuit's holding regarding Rule 11 evidentiary hearings and the holding of any other court of appeals, further review by this Court is unwarranted.

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[3] The language in *Brown* and *Rodgers* cited by Petitioners relates to Rule 11 claims based on allegations that the papers in question were filed for an "improper purpose." Rule 11 also prohibits filings not "well grounded in fact" and filings not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

II. THE FOURTH CIRCUIT'S RULE 11 HOLDINGS WERE PLAINLY CORRECT

A. A Defendant Who Fails Expressly To Reserve His Right To Seek Rule 11 Sanctions Prior to a Rule 41(a)(2) Dismissal Does Not Thereby Waive His Right to Sanctions

Petitioners contend that the Federal Rules prohibit a defendant from filing a motion for Rule 11 sanctions following a Rule 41(a)(2) dismissal unless the defendant -- prior to dismissal -- expressly reserves the right to seek sanctions. Petitioners' contention is supported neither by the text of Rule 41(a)(2) nor by the purposes underlying that rule.

First, Rule 11 imposes a mandatory requirement on district courts to impose sanctions on Rule 11 violators, and the violation is not expunged by a voluntary dismissal. As this Court noted in *Cooter & Gell*, "In order to comply with Rule 11's requirement that a court 'shall' impose sanctions '[i]f a pleading, motion or other paper is signed in violation of this rule,' a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action." *Id.* at 2455. Petitioners' argument undermines the mandatory nature of Rule 11 sanctions by severely restricting the conditions under which they can be imposed on Rule 11 violators. Nothing in the language of Rule 41(a)(2) warrants such a result.

Second, Rule 41(a) was adopted as a means of limiting a plaintiff's ability to dismiss an action, not to protect plaintiffs from sanction awards. Prior to adoption of Rule 41(a), liberal state and federal procedural rules often allowed dismissals or nonsuits as a matter of right up until the entry of the verdict. *See Cooter & Gell*, 110

S.Ct. at 2456. Defendants could be harassed into accepting settlements by plaintiffs who repeatedly dismissed (often on the eve of trial) and refiled the same cause of action. Rule 41(a) eliminated such abuse; under Rule 41(a), once an answer or summary judgment motion has been filed, a plaintiff may not dismiss his suit voluntarily without the consent of either the district court or the plaintiff. It is doubtful that a rule designed to prevent abuses by plaintiffs was also intended to protect plaintiffs from Rule 11 sanctions.

Third, Petitioners should not be heard to argue that they might not have sought a Rule 41(a)(2) dismissal had they known that Respondents intended to seek Rule 11 sanctions. Petitioners never asked the Court of Appeals to permit them to withdraw their voluntary dismissal, nor have they sought such relief from this Court. Nor could they have withdrawn their dismissal as a result of the Rule 11 motion, because Rule 11 sanctions are not "terms and conditions" of dismissal within the meaning of Rule 41(a)(2). *See Cooter & Gell*, 110 S.Ct at 2456 (a prohibition against refiling of a complaint as a sanction for a Rule 11 violation is not a "term or condition" of dismissal within the meaning of Rule 41(a)(2)). Any sanctions imposed upon Petitioners are not "terms and conditions" of dismissal because a Rule 11 violation is complete as soon as the offending pleading, motion, or other paper has been filed, and thus Petitioners would have been subject to the same sanctions regardless whether they went ahead with their voluntary dismissal. Accordingly, Petitioners have not been prejudiced in any way by the filing of a Rule 11 motion after dismissal of the underlying lawsuit.[4]

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[4] Respondents' delay in informing Petitioners of their intent to seek Rule 11 sanctions -- from May 2, 1989 (the date of Petitioners' (continued...)

Petitioners' Rule 41(a)(2) argument boils down to a claim that as a matter of policy, Rule 11 motions are best handled early on in the course of litigation rather than after its conclusion. There is something to be said for a policy of encouraging parties to notify opposing parties of potential Rule 11 claims early on in the litigation; such warnings may on occasion cause the erring party to mend his ways.[5] However, in this case, Respondents did not delay inordinately in providing notification of their intentions; indeed, the entire lawsuit encompassed a period of only three months, and Respondents filed their Rule 11 motion within six weeks after dismissal of the lawsuit. Accordingly, general policy arguments in support of early notification of Rule 11 violations are insufficient to support a finding that the District Court abused its discretion by imposing Rule 11 sanctions in this case.

In sum, Petitioners' claim that Rule 41(a)(2) proscribes the award of Rule 11 sanctions under the facts of this case lacks foundation either in the language or purposes of Rule 11 and Rule 41(a)(2).

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[4](...continued)
voluntary dismissal) until, at the latest, June 13, 1989 (the date on which Respondents filed their Rule 11 motion) -- also did not prejudice Petitioners. Since Petitioners ceased litigating the case by May 2, 1989, an earlier notification would have done nothing to reduce the size of potential Rule 11 sanctions by reduucing the level of legal fees incurred. *Cf. In re Yagman*, 796 F.2d 1165, 1183-84 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 450 (1987)(wasteful two-year lawsuit might have been avoided if district court had earlier warned plaintiff of frivolous nature of lawsuit).

[5] On the other hand, hearings on Rule 11 motions generally should not be permitted to interfere with ongoing litigation. Thus, the Advisory Committee Notes on Rule 11 indicate that "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of litigation."

B. The Fourth Circuit's Guidelines Regarding When Evidentiary Hearings Are Appropriate in Rule 11 Proceedings Do Not Violate Petitioners' Due Process Rights

Respondents filed their motion for Rule 11 sanctions on June 13, 1989. Petitioners thereafter had ample opportunity to respond to the motion. Petitioners filed a lengthy legal memorandum in opposition to the motion and subsequently filed a motion -- supported by another lengthy legal memorandum -- seeking Rule 11 sanctions against Respondents' counsel for having filed the initial Rule 11 motion. The District Court conducted a lengthy oral argument on both motions on September 8, 1989. However, the District Court declined Petitioners' request to conduct an evidentiary hearing; rather, both sides submitted evidence in the form of written affidavits. The District Court then issued a lengthy opinion on September 29, 1989 that explained in detail the bases of the court's decision to impose sanctions against Petitioners. *Amici* submit that, contrary to Petitioners' contention, the Fourth Circuit did not err in holding that Petitioners were provided all the process they were due under the Fifth Amendment.

The Advisory Committee Notes to Rule 11 recognize that due process consideration come into play with regard to the imposition of Rule 11 sanctions against parties and/or attorneys:

> The procedure [employed in handling a Rule 11 motion] obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction

> under consideration. In many situations the judge's participation in the proceeding provides him with full knowledge of the relevant facts and little further inquiry will be necessary.
>
> To assure that the efficiencies achieved through more effective operation of the pleadings regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, *the court must to the extent possible limit the scope of sanction proceedings to the record.* Thus, discovery should be conducted only by leave of court, and then only in extraordinary circumstances. (Emphasis added.)

Accordingly, it appears that the drafters of Rule 11 contemplated that targets of Rule 11 motions should normally be afforded the *minimum* amount of procedural protections that is due under the Fifth Amendment's Due Process Clause. The drafters believed that providing more elaborate procedures would defeat the purposes of Rule 11 by multiplying the costs of satellite litigation over the imposition of sanctions.

The guidelines established by the Fourth Circuit for determining when an evidentiary hearing is required in a Rule 11 proceeding are fully in accord with the Advisory Committee Notes. While the Fourth Circuit recognized that the existence of disputed factual issues in a Rule 11 proceeding may suggest that an evidentiary hearing should be conducted, the court declined to establish a hard-and-fast rule requiring evidentiary hearings in all such cases but rather left the decision whether to conduct a hearing to the sound discretion of the district judge. *Kunstler*,

914 F.2d at 521. In light of the concern of the Advisory Committee that satellite Rule 11 litigation be avoided, such a hard-and-fast rule would have been unwarranted.

This case well illustrates why a rule requiring evidentiary hearings whenever disputed fatual issues arise would be unworkable and would add little to the fact-finding process. All of the direct evidence that would have been submitted at an evidentiary hearing was made available to the District Court in the form of affidavits. An evidentiary hearing undoubtedly would have assisted the District Court somewhat in its fact-finding function: an evidentiary hearing would have provided the court with an opportunity to observe the demeanor of witnesses and to hear their testimony being cross-examined. However, the District Court had a reasonable basis for making credibility determinations based on the inherent plausibility of conflicting affidavits. Moreover, the assistance that a hearing would have provided to the fact-finding process was small in comparison to the costs that would have been incurred in such a hearing. Had the district court permitted an evidentiary hearing in this case, the parties were prepared to call scores of witnesses, in effect conducting a trial on the merits. If even half of those individuals whose affidavits were attached to the parties' briefs had testified at an evidentiary hearing, the hearing could have lasted for weeks. The costs of such proceedings would quickly discourage the filing of motions for Rule 11 sanctions, thereby eliminating Rule 11 as an effective deterrent to abusive litigation practices.[6]

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[6] This Court's due process case law recognizes that the costs of imposing a particular procedural safeguard may properly be considered in determining whether the safeguard should be constitutionally mandated. For example, the Court stated in Mathews v. Eldridge, 424 U.S. 319, 348 (1976): "When evaluating what process is due there comes a time when the benefit of an additional safeguard to the

(continued...)

The Fourth Circuit's determination that the District Court did not abuse its discretion in declining to conduct an evidentiary hearing under the facts of this particular case is not of sufficient importance to warrant review by this Court; that determination was sufficiently case-specific that further review would be unlikely to provide useful guidance in future Rule 11 proceedings.

Nonetheless, the Fourth Circuit's determination that the District Court did not abuse its discretion clearly was correct. The Fourth Circuit noted that the record contained substantial evidence of violations of all three prongs of Rule 11. *Kunstler*, 914 F.2d at 522. Thus, while the Fourth Circuit found that "the number of credibility determinations which the [district] court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value," the Fourth Circuit found that -- even discounting evidence that was the subject of credibility determinations -- there was more than enough evidence to sustain the District Court's finding that Petitioners had violated Rule 11.

Significantly, before the Fourth Circuit Petitioners challenged the failure to conduct an evidentiary hearing only as that failure related to the "improper purpose" prong of Rule 11. Petitioners Fourth Circuit Brief at 46. This Petition marks the first occasion on which Petitioners have expanded their due process argument to encompass an alleged right to evidentiary hearings on the "well grounded in fact" and "warranted by existing law" prongs

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[6](...continued)
individual affected by the government action, and to society in terms of increased assurance that the action is just, may be outweighed by the cost."

of Rule 11. This Court should not review the decision below where the claims now pressed by Petitioners were were not addressed to the lower courts.

In sum, the Fourth Circuit's refusal to mandate evidentiary hearings whenever disputed factual issues arise in Rule 11 proceedings, and its decision that the District Court did not abuse its discretion in declining to conduct an evidentiary hearing in this case are clearly correct; accordingly, review of the case by this Court is unwarranted.

CONCLUSION

Amici curiae Washington Legal Foundation, U.S. Senator Jesse Helms, U.S. Representatives Howard Coble and J. Alex McMillan, and the Allied Educational Foundation respectfully request that the Court deny the Petitions for writs of certiorari.

Respectfully submitted,

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